



BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, as amended; AND IN THE MATTER OF the complaint by Mini Chacko, dated January 30, 1996, amended March 21, 2000 alleging discrimination in employment on the basis of sex by Transpharm Canada Inc. (COB as Toronto Institute of Pharmaceutical Technology), Mr. Alex MacGregor and Mrs. Nneka MacGregor;
AND IN THE MATTER OF the complaint of Dr. Indar Maharaj, dated August 22, 1995 alleging discrimination in employment on the basis of reprisal by Transpharm Canada Inc. (COB as Toronto Institute of Pharmaceutical Technology), Mr. Alex MacGregor and Mrs. Nneka MacGregor.

B E T W E E N:

Ontario Human Rights Commission

-and-

Mini Chacko and Dr. Indar Maharaj

Complainants

-and-

Transpharm Canada Inc. (COB as Toronto Institute of Pharmaceutical Technology), Alex MacGregor and Nneka MacGregor

Respondents

INTERIM DECISION

Board of Inquiry: Mary Anne McKellar

Date: February 9, 2001

Board File No.: BI-0348/349-00

Decision No.: 01-006-I

Board of Inquiry (*Human Rights Code*)

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APPEARANCES

Ontario Human Rights Commission)	Sharon Ffolkes Abrahams
)	
)	

Dr. Indar Maharaj, <i>Complainant</i>)	Himself
)	
)	

Transpharm Canada Inc. (COB as)	
Toronto Pharmaceutical Technology),)	
Alex MacGregor and Nneka MacGregor,)	William Gale, Counsel
<i>Respondents</i>		

INTRODUCTION

This interim decision disposes of two motions: the Respondents' request for the adjournment of certain scheduled hearing dates; and the Commission's request for disclosure of certain documents in the possession of the Personal Respondent, Alexander MacGregor.

THE ADJOURNMENT REQUEST

On September 12, 2000, at the conclusion of the mediation in this matter, a Pre-hearing conference call was scheduled for December 19, 2000 and hearing dates were scheduled for February 5, 6, 8, 12, 13, 15, 19, 20, 22, 26, 27 and March 1, 2001. On the request of the Commission, and with the consent of the other parties, the Board adjourned the hearings scheduled for February 5 and 6, 2001 and converted the February 8, 2001 hearing into a conference call for the purpose of dealing with outstanding disclosure motions. Further hearing dates were scheduled for April 3, 4 and 5, 2001.

At the conclusion of the conference call today, after hearing the submissions of the parties with respect to the Commission's motion for disclosure, the Respondents requested an adjournment of the hearings scheduled for February 12, 13, 15, 19, 20, 22 and 26, 2001. The reason for the request is that the Respondent Alexander MacGregor "is required" to travel to Beijing to attend a conference and will be out of the country from February 17, 2001 until February 26, 2001. When the Board asked why the hearing dates prior to his departure need to be adjourned it was advised that Mr. MacGregor needed to prepare for the conference. The Board was not advised as to the nature of the conference or why Mr. MacGregor is "required" to attend.

The Commission did not oppose the adjournment request. Indeed, the Commission was strongly of the view that the Board should adjourn the hearings scheduled for the week of February 12 as well as the week of Mr. MacGregor's proposed absence. It argued that to commence the Complainants' testimony and then interrupt it

during that absence would be too disruptive to the proceedings. Additionally, the Commission noted that the Respondents had requested disclosure of certain medical information pertaining to the Complainant Mini Chacko, and it was not clear that it would be available by February 12, 2001. Finally, the Commission suggested that it could not commence its case without the benefit of the Board's decision on the disclosure motion heard February 8, 2001.

The Board finds no merit in any of these submissions. If the hearing proceeds on February 12, 13, and 15, the Board will hear three full days of evidence followed by a break of 11 days. If the Board proceeds as the Commission suggests, the Board will hear two days of evidence on February 27 and March 1, followed by a 32-day break. Additionally, it is not clear to the Board that the medical information pertaining to Ms. Chacko will not be available prior to her cross-examination by the Respondents. If that is the case, an adjournment request would be entertained at that time. Furthermore, the disclosure sought by the Commission pertains to the qualifications of Mr. MacGregor and there is no suggestion that that documentation could be identified by, introduced through, or commented on by the Complainants. By the Commission's own estimation, their testimony will not even be completed by the conclusion of next week. In any event, the Board was advised during the conference call on December 19, 2000, that dealing with the disclosure motion on February 8, 2001 rather than earlier in the week would not delay the commencement of the hearing. Finally, the Board undertook at the conclusion of their submissions on the disclosure motion to provide the parties with its decision by Friday, February 9, 2001.

The Complainant Maharaj did not oppose the adjournment request, but requested that Alexander MacGregor provide the Board with proof that he had indeed travelled to the conference in Beijing. The Board refused to impose such condition on the granting of any adjournment.

The adjournment request is denied.

THE MOTION FOR DISCLOSURE

The Commission seeks disclosure of “the qualifications and certificates of Alexander MacGregor with respect to Pharmaceuticals, Pharmaceutical technology and industry”. It takes the position that these documents are arguably relevant to the issues in dispute having regard to the fact that Mr. MacGregor purported to terminate both Complainants for incompetence, and that his own qualifications and ability to make the necessary assessments in that regard are germane to the *bona fides* of that assessment. The Commission indicated that it does not believe Mr. MacGregor actually possesses the qualifications and certifications he holds himself out as possessing.

Respondents’ counsel does not take issue with the Board’s jurisdiction to make the order requested. He further agrees that the test for disclosure is arguable relevance. He submits, however, that the documents in question are not arguably relevant for two reasons. First, he suggests that the Commission intends to use them to attack the credibility of Mr. MacGregor. The Board notes that the Commission did not indicate that intention in any of the motion materials provided or in its oral submissions. The Board agrees with Respondent counsel’s submissions that a witness’ credibility with respect to his or her testimony on a collateral issue is not susceptible of challenge on the basis that to so permit would unduly prolong the hearing:

There is a general rule that answers given by a witness to questions put to him or her on cross-examination concerning collateral facts are treated as final, and cannot be contradicted by extrinsic evidence. Without such a rule, there is the danger that litigation will otherwise be prolonged and become sidetracked and involved in numerous subsidiary issues. . . . Difficulties have arisen, however, as to whether a question merely goes to a collateral issue or whether it goes to a substantive one.

J. Sopinka, et al., *The Law of Evidence in Canada* (1992), at pp. 883-84

The rule against collateral fact limits the questions that may properly be put to a witness called in reply. It does not affect the ability of a party adverse in interest to

impeach the credibility of a witness during cross-examination, and it certainly has nothing to do with the pre-hearing production of documents.

Respondents' counsel also submits that the *bona fides* or the correctness of MacGregor's assessment of the Complainants' work performance is irrelevant because this proceeding is not analogous to a wrongful dismissal action where the Board is charged with determining whether there was cause for the termination of the Complainants. Counsel submits that an employer could terminate an employee wholly without cause, but still not act in contravention of the *Human Rights Code*, R.S.O. 1990, c. H.19 (as amended). The Board agrees that that is certainly possible. The Board also notes, however, that it rarely has direct evidence of a respondent's stated intention to discriminate. As the Commission pointed out, the complete absence of any cause for termination might well cause a Board to infer that an employee was terminated because of some prohibited ground under the *Code*.

The Board therefore concludes that the documents sought by the Commission are arguably relevant to the issues in dispute on the hearing as presently framed and are subject to disclosure.

The mere fact that the Board has found the documents to be arguably relevant for the purposes of pre-hearing disclosure does not necessarily mean that they will be admissible in evidence at the hearing. The Board notes that the pleadings do not reveal the nature of the alleged defects in the Complainants' performance that the Respondents say they relied on in terminating them. If, for example, one such issue related to excessive absenteeism or lateness, it would be hard to imagine how Mr. MacGregor's PhD or lack thereof could be pertinent to his assessment of that employment deficiency. Respondent Counsel's suggestion that the Complainant Maharaj was terminated because he was an ineffective lecturer and that Mr. MacGregor's ability to assess that did not implicate the extent of his knowledge of the subject area being taught is not compelling. In any event, it appears from her letter of employment that the Complainant Chacko was clearly performing some duties of a technical nature.

ORDERS

The Board directs the parties to attend before it on Monday, February 12, 2001.

If the Commission and the Complainant Chacko have not already provided the Respondents with the medical documentation they agreed to provide, they are directed to do so at that time, or to advise when that documentation will be available.

If the Respondents have not already provided the disclosure ordered in this decision by Monday, February 12, 2001, the Board directs them to do so at that time, or to advise when that documentation will be available.

The Board directs the Respondents to particularise the ways in which it says the Complainants were not competent to perform their jobs and which led to the decision to terminate them. Those particulars are to be provided to the Board orally at the commencement of the hearing on Monday, February 12, 2001.

Dated at Toronto, Ontario this 9th day of February, 2001.



Mary Anne McKellar, Vice-Chair

